STATE OF MICHIGAN

IN THE SUPREME COURT

(ON APPEAL FROM THE MICHIGAN COURT OF APPEALS)

NEXTEER AUTOMOTIVE CORPORATION, a Delaware corporation,

Plaintiff-Appellee,

v

MANDO AMERICA CORPORATION, a Michigan corporation, TONY DODAK, an Individual; ABRAHAM GEBREGERGIS, an Individual; RAMAKRISHNAN RAJAVENKITASUBRAMONY, an Individual; CHRISTIAN ROSS, an Individual; KEVIN ROSS, an Individual; TOMY SEBASTIAN, an Individual; THEODORE G. SEEGER, an individual; TROY STRIETER, an Individual; JEREMY J. WARMBIER, an Individual; and SCOTT WENDLING, an Individual; jointly and severally,

Defendants-Appellants,

and

CHRISTIAN ROSS, KEVIN ROSS, TOMY SEBASTIAN, THEODORE G. SEGER, and TONY DODAK,

Counter/Third-Party Plaintiffs,

v.

NEXTEER AUTOMOTIVE CORPORATION, a Delaware corporation, LAURENT BRESSON, and FRANK LUBISCHER,

Counter/Third-Party Defendants. /

Supreme Court No.

Court of Appeals No. 324463

Lower Court No. 13-021401-CK
(Saginaw County Circuit Court)

NOTICE OF FILING APPLICATION FOR LEAVE TO APPEAL

DEFENDANTS-APPELLANTS' APPLICATION FOR LEAVE TO APPEAL

*****ORAL ARGUMENT REQUESTED*****

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NOTICE OF FILING APPLICATION

TO: Michigan Court of Appeals Clerk
P.O. Box 30022
Lansing, MI 48909

Clerk of the Court
Saginaw County Circuit Court
111 S. Michigan Ave.
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NOW COME Defendants-Appellants Mando America Corporation, Tony Dodak, Abraham Gebregergis, Ramakrishnan Rajavenkitasubramony, Christian Ross, Kevin Ross, Tomy Sebastian, Theodore G. Seeger, Troy Strieter, Jeremy J. Warmbier, and Scott Wendling, and state that on March 23, 2016, their application for leave to appeal has been filed with the Michigan Supreme Court.

Respectfully submitted,

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Dated: March 23, 2016

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STATEMENT IDENTIFYING JUDGMENT APPEALED

This is an application for leave to appeal from a Michigan Court of Appeals' opinion dated February 11, 2016, reversing a July 10, 2014 decision of the Saginaw County Business Court granting Appellant Mando America Corporation's ("Mando") motion for leave to amend its answer to the First Amended Complaint and to compel arbitration, and an October 14, 2014 denial of Appellee Nexteer Automotive Corporation's ("Nexteer") motion for reconsideration. A three judge panel, including Judges Peter J. O'Connell, Jane M. Beckering, and Donald S. Owens, reversed the orders of Saginaw County Business Court Judge M. Randall Jurrens, which granted Mando's motion to amend its answer, directed the parties to proceed to arbitration pursuant to an arbitration agreement, and remanded the matter back to Business Court for Saginaw County. A copy of the opinion is attached as **Exhibit A**.

Mando American Corporation ("Mando") and the Individual Defendants[1] respectfully submit this joint brief in support of their Application for Leave to Appeal the Appellate Decision, which reversed an August 22, 2014 order of the Business Court for the Circuit Court of Saginaw County granting Mando's motion to amend its answer and compel arbitration. *See* August 22, 2014 Stipulated Order re: Defendant Mando America Corporation's Motion to Amend Answer to First Amended Complaint and Compel Arbitration (the "Arbitration Order," **Exhibit C**). Appellants further appeal the reversal of the Business Court's October 14, 2014 Opinion and Order Denying Nexteer

[1] The Individual Defendants are Tony Dodak, Abraham Gebregergis, Ramakrishnan Rajavenkitasubramony, Christian Ross, Kevin Ross, Tomy Sebastian, Theodore G. Seeger, Troy Strieter, Jeremy J. Warmbier, and Scott Wendling. They join in this Application.

Automotive Corporation's ("Nexteer") Motion for Reconsideration of Order Granting Mando's Motion for Leave to File Amended Answer and to Compel Arbitration of All Claims (the "Reconsideration Order," **Exhibit D**) (collectively, with the Arbitration Order, the "Orders").

RELIEF SOUGHT

Defendants-Appellants respectfully request this Court to take peremptory action reinstating the Business Court's judgment or grant leave and reverse the Court of Appeals decision.

STATEMENT OF QUESTION PRESENTED

Does this State's strong preference of enforcing contractually-agreed-to arbitration provisions permit a finding of waiver, when prejudice to the party opposing arbitration has not been found and the waiver decision rests on a case management order prepared by the court following the first status conference, which: (i) states that it reflects only the parties' "preliminary" positions, (ii) indicates that arbitration is not "waived," and (iii) was entered during injunction proceedings that were expressly carved out of the governing arbitration clause?

Defendants-Appellants answer: "No."

Plaintiff-Appellee answers: "Yes."

The Business Court for the Circuit Court of Saginaw County answers: "No."

The Court of Appeals answers: "Yes."

GROUNDS FOR APPLICATION AND JURISDICTION

The Supreme Court should grant this application because it involves principles of major significance to the state's jurisprudence and a clearly erroneous published decision of the Court of Appeals that will cause material injustice. *See* MCR 7.305(B)(3) and (5)(a).

This case presents issues of important jurisprudential significance. The Court of Appeals' decision permanently deprives Mando of an important contract right to arbitrate based on nothing more than a case management form order (the "CMO") that stated on its face that it represented only the parties' "preliminary advice" to the Business Court as to their positions. This form order, which was prepared by the Business Court just three weeks after Nexteer first commenced an action for temporary *ex parte* relief, contains multiple provisions reflecting the early stage of the case at which it was entered. Nevertheless, the Court of Appeals deemed the form order, completed by Judge Jurrens, to have been a "stipulation" by Mando that irrevocably waived Mando's contractual right to arbitrate.

This Court's review is necessary because the Court of Appeals' decision defies long standing precedent and creates confusion about the state of the law. In fewer than two pages of analysis, the Court of Appeals reversed two separate, carefully considered rulings that address issues of the precise type that the Business Court was created to resolve. The Business Court was created to "[e]nhance the accuracy, consistency and predictability of decisions in business and commercial cases." *See* MCL 600.8033(3)(c). Yet the Court of Appeals second-guessed the Business Court's decision enforcing the

parties' contract to arbitrate, without consideration of Michigan's strong preference for contractually-agreed-to arbitration as a forum for resolving business disputes. In so doing, the Court of Appeals defied the precedent of this State and the United States Supreme Court holding that doubts regarding waiver should be resolved in favor of arbitration and that waiver of arbitration requires prejudice. Outside the arbitration context, moreover, it is well settled that leave to amend both scheduling orders and affirmative defenses should be granted freely, in some instances as late as during trial. By holding that the CMO that the Business Court prepared less than one month into this case cut off Mando's right to invoke arbitration at any later stage – even though there has never been any finding that arbitration would prejudice Nexteer, and the CMO itself indicates that *there was no waiver* – the Court of Appeals ignored these well-established principles.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

A. Nexteer drafted and signed an agreement providing for arbitration to resolve disputes

In June 2012, Mando and Nexteer began considering the possibility of a limited joint venture. *See* First Amended Complaint ¶ 134 (**Exhibit G**). After negotiating the terms of a non-disclosure agreement to govern information exchanged during their discussions, Mando accepted Nexteer's proposed form of agreement, which included an arbitration clause (the "NDA"). *See Id*. at ¶ 135; May 7, 2014 Affidavit of Ronald Harkrader ("Harkrader Aff.") ¶ 5-8 (**Exhibit P)**.

Section 11(a) of the NDA contains a broad arbitration provision:

> *[A]ny dispute, controversy, or claim arising out of or in relation to this Nondisclosure Agreement*, including the validity, invalidity, breach or termination thereof, shall be settled by arbitration in accordance with the Rules of Arbitration of the International Chamber of Commerce in force on the date when the notice of Arbitration is submitted in accordance with these Rules: (i) The place of the arbitration is Geneva, Switzerland; (ii) The arbitral tribunal consists of three arbitrators; and (iii) The arbitration proceedings shall be conducted in English.

NDA § 11(a) (**Exhibit N**) (emphasis added). Section 11(b) of the NDA reiterates that arbitration is to be the "sole and exclusive procedures for the resolution of disputes between [Nexteer and Mando] arising out of or relating to" the NDA. *Id.* § 11(b).

The NDA contained a limited exception, however, for injunctive proceedings. Specifically, the NDA provided that notwithstanding the arbitration clause, a party could seek "a preliminary injunction or other preliminary judicial relief from a court with competent jurisdiction," to avoid irreparable harm. *Id.*

Mando and Nexteer discontinued exploration of the joint venture in August 2013. *See* First Amended Complaint ¶ 143 (**Exhibit G**). However, by its terms, the NDA continued to govern disputes arising from or related to its subject matter. *Id.* ¶ 141; *see also* NDA § 7 (**Exhibit N**).

In September 2013, following changes in Nexteer management, the Individual Defendants resigned from Nexteer. *See* Counter/Third-Party Plaintiff's Counterclaim and Third-Party Complaint against Nexteer Automotive and Third-Party Defendants ¶ 67 (**Exhibit H**). Nexteer had never obtained any agreement from the Individual Defendants, who are automotive engineers by training and experience, to refrain from working in the automotive industry or for competitors following separation from Nexteer. *See* Complaint at ¶¶ 35, 37, 48 (discussing obligations allegedly created by the employment agreements, without mention of any restriction on accepting employment with competitors of Nexteer) (**Exhibit F**). Nexteer contended, however, that it was entitled to restrain the Individual Defendants from going to work for a competitor based on provisions of an employment agreement entered into in 2009 between each of them and Nexteer, which discussed solicitation and treatment of Nexteer information. *See id.; see also* Employment Agreements (**Exhibit T**).

B. Nexteer's initial rush to court to prevent the Individual Defendants from working for Mando failed, but Nexteer advised the court and parties that it planned to re-notice a preliminary injunction hearing

On November 5, 2013, Nexteer filed its Complaint in Saginaw Circuit Court, requesting assignment to the specialized Business Court. At approximately 4:45 p.m. that same day, Nexteer approached the Business Court for an *ex parte* temporary

restraining order. *See* Transcript of November 15, 2013 Hearing on Nexteer's Motion for Temporary Restraining Order and Expedited Discovery ("TRO Hearing") at 4 (**Exhibit Q**). The Business Court was unavailable to hear Nexteer's application at that time, but instructed Nexteer to email its pleadings to counsel for Mando. *Id.* at 5.

Nexteer attached the NDA to its Complaint, but did not include any cause of action for breach of the NDA. Nexteer argued that based on the provisions of the 2009 employment agreements with the Individual Defendants, as well as its Complaint, memoranda of law and affidavits, Nexteer was entitled to preliminary relief preventing the Individual Defendants from working as engineers at Mando in their field of expertise. *See, e.g.*, Complaint at ¶¶ 35, 37, 48 (**Exhibit F**).

A hearing was set for November 15, 2013 on Nexteer's application for preliminary relief including: (1) a preliminary injunction that would "permanently restrain[] all Defendants from using or disclosing any of Nexteer's confidential and proprietary information and trade secrets including information on Nexteer's [steering] systems;" (2) a temporary restraining order that would prohibit the Individual Defendants from soliciting Nexteer's employees or working on Mando's electrically assisted power steering system for a year; and (3) other relief including monetary damages against the Defendants. *See* Complaint at 38-39 (**Exhibit F**).

The week after Mando was served with Nexteer's Complaint, the Business Court held an expedited hearing, at which Judge Jurrens advised Nexteer that he was prepared to hear evidence on Nexteer's motion for a preliminary injunction. Nexteer stated that it was unprepared to hold an evidentiary hearing that day, but advised the

Business Court that it expected it could hold such a hearing within a week or 30 days. *See* TRO Hearing at 25:2-7; 27:13-25 (**Exhibit Q**).

The parties argued extensively at the November 15 hearing over Nexteer's request that the Individual Defendants should be restrained from working for Mando, either permanently or until an evidentiary hearing took place. The Business Court judge indicated his view as of the hearing that the 2009 employment agreement on which Nexteer sought to rely had been superseded by an agreement entered in 2010. Nexteer denied this, and maintained that the 2009 agreement survived. *Id.* at 10-14.

The Business Court denied Nexteer's application for a temporary restraining order. But toward the end of the hearing, the Business Court stated that Nexteer could re-notice a preliminary injunction hearing. *Id.* at 97 ("I want you to focus on what you'll need to prove for a preliminary injunction"); *see also id.* at 105. Nexteer indicated that it would do so in the near future. *Id.* at 95 (complaining that "too much time has passed" since commencement of the action, discussing expedited discovery for a preliminary injunction hearing, and stating Nexteer's proposal to "just condense everything over 30 to 40 [more] days").

C. Ten days after the initial hearing, the business court issued the CMO following a conference call

At the close of the TRO hearing, the Business Court provided counsel for all parties with a pre-printed, standard form case management order. *See id.* at 105 ("I'm going to give you a template of an order and we're going to have a conference by telephone sometime next week"). The Business Court advised the parties that they

should expect to be in regular contact, with biweekly phone calls in the coming weeks, and that its hope was to "resolve everything within [6] months," a time frame that would be "particularly applicable when injunctive relief is granted." *Id.* at 105-106. Shortly thereafter, the Business Court held a conference call to discuss scheduling and prepared a draft scheduling order for the parties to review.

On November 25, 2013, just 17 days after Mando first received the Complaint and while Nexteer was still intending to pursue a preliminary injunction, the Business Court signed the CMO. *See* **Exhibit O**. The CMO indicates that it represents the parties' "preliminary" statements of their positions. It includes a box to indicate that the parties had waived arbitration, but the Business Court did not check that box. *Id.* at 2. Instead, the Court added, and checked, a new box to indicate that although an arbitration agreement existed, it was "not applicable." *Id.* The CMO reflects that Mando's answer and affirmative defenses were "not yet due" at the time of the case management conference, and noted, with respect to admissions and stipulations of fact and as to documents, that the parties had made "none." *Id*. at 1. The CMO also memorializes the Business Court's order that discovery should proceed only on a single narrow issue: whether the 2009 or 2010 version of Nexteer's agreement with its employees controlled. *Id.* at 2.

On December 6, 2013, Nexteer filed an Amended Complaint. *See* **Exhibit G**. On December 17, 2013, Mando and the Individual Defendants moved to dismiss the Amended Complaint on three principal grounds: (i) Nexteer's claim for tortious interference failed due to the lack of the required element of malice; (ii) the 2010

employment agreements controlled, and, therefore, the Individual Defendants did not have any non-solicitation obligations; and (iii) a number of Nexteer's individual equitable causes of action were preempted by the Michigan Uniform Trade Secrets Act. The following day, Mando filed an Answer to the Amended Complaint. While not asserting arbitration as an affirmative defense in its Answer, Mando "reserve[d] the right to add additional affirmative defenses" in the future. Answer of Defendant Mando America Corporation to Plaintiff's First Amended Complaint (the "Answer") at 32 (**Exhibit I**). The Individual Defendants also filed an Answer.

D. Subsequently, to avoid dismissal of its claims, Nexteer explained its reliance on the NDA

At the January 24, 2014 hearing on Defendants' motion to dismiss, Nexteer characterized the NDA as critically important to its case:

> Again they say that all we've alleged is that these employees worked for Nexteer and had accessed information and now they work for a competitor. We've alleged a lot more than that. *We've alleged the whole scheme where Mando and the individual defendants surreptitiously worked together while Mando was Nexteer's partner,* and the individual defendants were Nexteer's employees to create a competing operation and that spawns a lot of claims and that's duplicitous behavior.

Transcript of January 24, 2014 Hearing on Defendants' Motion to Dismiss ("MTD Hearing") at 46-47 (**Exhibit R**) (emphasis added).

After the hearing, the Business Court invited the parties to submit supplemental briefing. In particular, the Business Court authorized Nexteer to address Mando and the Individual Defendants' argument that Nexteer's tortious interference claim should be

dismissed for failure to plead the required element of malice or wrongful conduct. Thereafter, Nexteer's supplemental brief, again, argued that it was the NDA that supplied the missing element of wrongfulness. *See* Response to Supplemental Brief of Defendant Mando Regarding Motion for Summary Disposition filed February 17, 2014 ("Nexteer Supplemental Brief") at 3-4 (**Exhibit M**).

Nexteer's supplemental brief elaborated on the importance of the NDA to Nexteer's theory of the case. Specifically, Nexteer's brief described an alleged "premeditated scheme" between Mando and the Individual Defendants comprised of the following: (i) Mando entered the NDA; (ii) Mando agreed not to use information obtained through the NDA other than to advance the joint venture; (iii) through the NDA, Mando obtained information about "a key technology that cannot be legitimately reverse-engineered;" and (iv) that based on all this "Mando and the Individual Defendants misused [the NDA] in a disloyal scheme," and Mando "used the joint-venture relationship" to recruit "Nexteer's key employees" and "to encourage those key employees to violate their non-solicitation agreements with Nexteer." *Id*. Nexteer therefore claimed that *all* of Mando's allegedly actionable conduct arose out of or related in one way or another to the Nexteer-Mando joint venture that Nexteer pleaded was governed by the NDA, and that any misconduct by the Individual Defendants flowed out of Mando's conspiracy with the Individual Defendants in breach of the NDA.

On February 26, 2014, the Business Court issued an order dismissing certain of Nexteer's claims in part or in whole, to the extent preempted by Nexteer's Michigan

Uniform Trade Secrets Act claim, duplicative or redundant of other claims, or, as to one cause of action, for failure to state a viable claim under Michigan law. Significantly, the Business Court denied Mando's motion to dismiss Nexteer's tortious interference claim, accepting the argument that Nexteer's allegations regarding "misuse" of the NDA salvaged that claim by supplying the required element of malice or wrongful conduct. Nexteer did not seek leave to appeal the February 26, 2014 order.

E. Following Nexteer's explanation of the importance of the NDA to all its claims, Mando moved to enforce its contractual rights under the NDA and compel arbitration

On May 8, 2014, Mando filed its Motion to Amend Answer to First Amended Complaint and Compel Arbitration (the "Motion"). In support of its Motion , Mando cited MCR 2.118's liberal standard for allowing amendments to pleadings, and case law holding that amendments should be granted in the absence of "bad faith or prejudice." *See* Mando America Corporation's Brief in Support of Motion to Amend Answer to First Amended Complaint and Compel Arbitration ("Mando Brief on Motion") at 7 (**Exhibit J**). Mando explained that it served its original answer when the case remained in a "preliminary relief posture for which the NDA creates a limited exception," and that the answer was drafted at a time when the significance of the NDA was "still emerging." *Id*. at 8. Mando further argued in its moving papers that Nexteer would not be prejudiced by an order compelling arbitration.

Nexteer opposed arbitration on the ground that its claims were not arbitrable under the NDA. Nexteer did not identify any prejudice that it would incur from arbitration. *See generally*, Nexteer Response to Motion to Compel (**Exhibit K**). Nexteer

did not mention the CMO, and did not argue that there had been an affirmative waiver of Mando's right to arbitration. *Id.*

On June 3, 2014, the Business Court held a lengthy hearing on Mando's Motion and carefully considered all the parties' positions. *See* June 3, 2014 Transcript of Hearing on Motion to Compel Arbitration ("Arbitration Hearing") (**Exhibit S**). During the hearing, which lasted nearly four hours, Judge Jurrens offered Nexteer repeated opportunities to identify any prejudice that it would incur from arbitration. *See, e.g., id.* at 48. Nexteer was unable to do so.

Judge Jurrens also raised the CMO. He acknowledged that the conference had not been transcribed, but (while noting that his recollection might not be perfect) he recalled that the parties' telephonic discussion regarding the arbitration clause of the NDA was "more in passing" and that he had "some recollection of no substantive discussion, but at least a recognition that it was there." *Id.* at 43-44. The Judge also acknowledged that he, after consulting with Mando and the other parties, had not checked the "waiver" box and had instead indicated that arbitration was "not applicable." *Id.* at 45, 122 (Business Court: "I realize[] [the 'is not applicable' box] is different than waiver and that's why it wasn't checked").

At the close of the hearing, Judge Jurrens asked the parties to submit additional briefing on whether the CMO constituted a waiver of Mando's rights and, again, on whether any prejudice would accrue to Nexteer should it be compelled to arbitrate. In its supplemental brief, Nexteer was not able to find any authority holding that a case management order could be enforced against a party as a waiver of arbitration rights.

Nexteer also failed to identify any credible prejudice. *See generally* Supplemental Brief of Plaintiff Nexteer Automotive As to Mando America's Waiver of Arbitration (**Exhibit L**).

On July 10, 2014, the Business Court issued its decision, and concluded that Nexteer's claims were arbitrable under the NDA. *See id.* at 9 (holding that the NDA was an "integral part" of the dispute, and formed "necessary elements of Nexteer's misappropriation and tortious interference claims, without which they would have been subject to dismissal," such that the present dispute is "arising out of or in relation to" the NDA). The Business Court held that:

> (1) Nexteer's claims are arbitrable, (2) Mando should be granted leave to file its proposed amended answer, (3) Nexteer's claims should be referred to arbitration in accordance with the Rules of Arbitration of the International Chamber of Commerce (per the NDA, but to be conducted within the Eastern District of Michigan in accordance with the FAA),[2] and (4) the present litigation of Nexteer's claims should be stayed.

Opinion Re: Mando's Motion for Leave to File Amended Answer and to Compel Arbitration ("Arbitration Opinion") at 14 (**Exhibit B**).

On August 22, 2014, the Business Court entered the parties' stipulated order comporting with the Arbitration Opinion. *See* Arbitration Order (**Exhibit C**). Thereafter on September 3, 2014, upon the stipulation of the parties to the counterclaim, the Business Court stayed the counterclaims pending the outcome of the arbitration. *See*

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[2] The ICC Rules permit hearings to take place in a location agreed to by mutual consent. See ICC Rules Art. 18 (**Exhibit U**). At the Arbitration Hearing, in response to questioning by Judge Jurrens, Mando represented that it would "leave it up to Nexteer" with respect to the location of any arbitration hearing. Arbitration Hearing at 59 (**Exhibit S**). Nexteer, in turn, affirmed, "if it is arbitrated we would want it here in Michigan for sure." *Id.* at 61.

Stipulation to Stay Counter/Third Party Plaintiffs' Claims Pending Further Order from the Court ("Stay Order") at 3 (**Exhibit E**).

Nexteer moved the Business Court to reconsider the Arbitration Order. On October 14, 2014, the Court denied Nexteer's motion. *See* Reconsideration Order (**Exhibit D**).

F. The Court of Appeals erroneously overturned the Business Court

Rather than act to protect any alleged trade secrets by commencing arbitration, Nexteer filed an application for leave to appeal the Business Court's decision to the Michigan Court of Appeals. The Court of Appeals granted leave and on February 11, 2016, the Court of Appeals issued a four-page decision. The Court of Appeals held that the box checked "not applicable" in the Court's CMO was a "stipulation" by Mando that expressly waived arbitration and precluded amendment of Mando's answer to invoke arbitration, even in the absence of any finding of prejudice to Nexteer. *See* Appellate Decision at 3-4 (**Exhibit A**).

Defendants-Appellants now seek peremptory action or, failing that, leave to appeal the Court of Appeals' decision.

STANDARD OF REVIEW

The Supreme Court may grant an application for leave to appeal where "the issue involves a legal principle of major significance to the state's jurisprudence" or where the Court of Appeals' "decision is clearly erroneous and will cause material injustice." *See* MCR 7.305(B)(3), (5)(a). This case involves both. This application raises questions of law regarding whether Mando irrevocably waived its right to arbitration. Such questions are reviewed *de novo*. *See Madison Dist Pub Sch v Myers*, 247 Mich App 583, 588; 637 NW2d 526 (2001).

ARGUMENT

This State's Strong Preference Of Enforcing Contractually-Agreed-To Arbitration Provisions Does Not Permit A Finding That A Party's Contractual Right To Arbitrate Was Waived, When There Was No Finding Of Prejudice To The Party Opposing Arbitration And The Finding Of Waiver Rests On A Case Management Order Prepared By The Court Following The First Status Conference, Which: (I) States That It Reflects Only The Parties' "Preliminary" Positions, (II) Indicates That Arbitration Is Not "Waived," And (III) Was Entered During Injunction Proceedings That Were Expressly Carved Out Of The Governing Arbitration Clause

A. A preliminary case management order should not be deemed to be a waiver

1. Mando did not waive arbitration in the CMO because it did not agree that the Business Court should check the "Waiver" box, and the Business Court did not do so

The CMO explicitly demonstrates that Mando did not waive its right to arbitration during the telephonic scheduling conference that occurred less than a month after commencement of this action. A finding of waiver requires "clear and unmistakable evidence." *Port Huron Educ Ass'n, MEA/NEA v Port Huron Area Sch Dist*, 452 Mich 309, 327; 550 NW2d 228 (1996). The CMO contains neither clear nor unmistakable evidence of any intent on the part of Mando to waive its contractual right to arbitrate: to the contrary, it shows that Mando did *not* consent to any waiver. As the Business Court itself recognized, "[the 'is not applicable' box] is different than waiver and that's why it wasn't checked." Arbitration Hearing at 122 (**Exhibit S**).

Further, the CMO states that it is only a "preliminary" statement of the parties' positions. *See* CMO at 1 (preamble) ("The court having conducted a case management conference with each party/attorney, and the court being preliminarily advised of the following . . .") (**Exhibit O)**. Indeed, at the time of the case management conference, it

would have been impossible for Mando's views to have been anything *but* "preliminary."

The procedural posture of the case at the time when the Business Court prepared the CMO, as reflected in the language of the CMO, confirms that the CMO represented only an early-stage assessment that was subject to change. For example, unlike in the typical case, Nexteer's demand for injunctive relief dictated that the case management conference take place on an expedited basis before Mando had answered the Complaint or the time to do so had run. *See* CMO at 1 (**Exhibit O**). The CMO states that Mando's affirmative defenses – arbitration among them – were "not yet due." *Id.* Nexteer was still free to amend its pleadings. *Id.* The time to elect a jury trial also had not expired. *Id.* at 3.

The CMO also memorializes that, following the case management teleconference, Judge Jurrens authorized discovery to proceed on just one, narrowly defined issue, which had been a central focus of the injunction argument a few days before. This was whether the 2009 employment agreement between Nexteer and the Individual Defendants controlled as Nexteer claimed, or whether it had been superseded in 2010. *Id.* at 2. Neither version of the Individual Defendants' employment agreements had any arbitration clause.[3] Discovery was not authorized concerning the NDA, or any of the

[3] The Business Court correctly held that Nexteer's claims against the Individual Defendants, who are non-parties to the relevant arbitration agreement between Mando and Nexteer, should be arbitrated with their consent pursuant to settled law authorizing joinder of claims against non-signatories in appropriate circumstances, such as where the non-signatories are agents or when a signatory such as Nexteer pleads an intertwined course of conduct against both signatories and non-signatories, such as the "scheme" between Mando and the Individual Defendants on which Nexteer elaborated after the CMO was signed during the motion to dismiss proceedings. The Court of Appeals did not disturb that holding.

parties' alleged conduct related to it. Hence, the scope of the case was significantly limited when the Business Court prepared the CMO.

In sum, in the words of the Business Court itself, the CMO was "not necessarily [set] in stone" and "as things progress things c[ould] change." Arbitration Hearing at 71 (**Exhibit S**). Indeed, given the limited discovery authorized by the CMO, no one could have expected that the case would proceed past the very first steps of the preliminary injunction stage without the CMO changing.

Not only was the CMO expected to change, it was entered during preliminary-stage proceedings that were expressly carved out of the NDA.[4] By all appearances, Nexteer remained intent on seeking injunctive relief when the case management conference was held.

Moreover, Mando was still defending the injunctive claims; the scope and nature of Nexteer's claims evolved as Nexteer explained them over the course of the weeks that followed. Given this context, it was entirely reasonable for Mando to preliminarily conclude that arbitration was "not applicable" at this stage, without waiving its contractual right to arbitration.

2. A preliminary case management tool to guide the management of a case should not be given the legal weight of a waiver

The Court of Appeals' decision that checking "not applicable" was a waiver runs counter to the Business Court's own understanding of the CMO. Similarly, Nexteer

[4] In the version of the NDA that was attached to Nexteer's Complaint, the portion of the arbitration agreement authorizing pursuit of injunctive relief in court was specifically underlined, presumably to emphasize that Nexteer's motion for such relief was not inconsistent with the NDA and not barred by the parties' agreement to arbitrate. *See* NDA § 11(b) (**Exhibit N**).

itself did not even mention the Court's having checked the "not applicable" box as a factor when it opposed Mando's motion to amend its answer and compel arbitration.

Nexteer's and the Business Court's instincts were correct. Michigan rules and precedent reflect an understanding that case management orders are not static. Preliminary assessments made therein should not be accorded the substantial weight of a waiver of protected and favored contractual rights.

a. The CMO was a case management tool

The CMO in this case was issued under MCR 2.401. *See* Arbitration Opinion at 11 (**Exhibit B**). Rule 2.401 affords the court and the parties an opportunity to confer early in the case to discuss scheduling and other matters. *See* MCR 2.401(C)(1); *see also* MCR 2.401(B)(1)-(2). Rule 2.401 authorizes the court to issue a scheduling order following such an early conference. MCR 2.401(B)(1).[5] Although such a case management order is a useful tool to help guide the parties and court, these orders are not intended to serve as a vehicle for the waiver of important rights.

For example, unlike judicial orders that are treated as final and binding, the Michigan Court Rules specifically contemplate that "[m]ore than one [scheduling] order may be entered in a case." MCR 2.401(B)(2). In fact, parties are given a liberal right to seek amendment of a scheduling order. *See* MCR 2.401(B)(2)(d); *see also Moton v*

[5] The genesis of Rule 2.401grew from the Supreme Court's desire to create a set of rules that would encourage active judicial involvement at an earlier stage of the proceedings so as to facilitate the efficient progress of a case. *See Report of the Caseflow Management Rules Committee*, 435 Mich 1210, 1211 (1990) ("the central feature in effective caseflow management is the active, early, and continuing involvement of the trial court in the processing of cases"). In formulating the new rules that would address this goal, the Caseflow Management Rules Committee noted that the new rules were intended "to facilitate that process by giving the court necessary flexibility in exercising that management function, and to avoid artificial impediments to effective management." *Id.* at 1212.

Oakwood Healthcare, Inc, Unpublished opinion per curiam of the Court of Appeals, issued May 18, 2001, at *1 (Docket No 220823) (**Exhibit V**) ("A party may move for modification of a scheduling order at any time") (citing MCR 2.401(B)(2)(c)(iii)). Yet, inexplicably, the Court of Appeals found the CMO in this case to foreclose any later amendment based on changes in the case.

The CMO has none of the characteristics of a binding Business Court ruling on the arbitrability of Nexteer's claims. There are no findings of fact, no consideration of the law, nor any legal conclusion. This is not surprising, because the legislative history of Rule 2.401 supports that a case management order is not intended to be an opportunity for rulings by the Court on substantive issues like whether a case should proceed in arbitration rather than in court. Though Rule 2.401 calls for the Court to "consider" "whether jurisdiction and venue are proper," the drafters' use of the word "consider," instead of "determine," was deliberate. *See* MCR 2.401(B)(1)(a). The Caseflow Management Committee that proposed the rule recognized that at "an early scheduling conference it would be difficult for the court to make any such determination" regarding venue and jurisdiction, and, therefore, explained that "any action to be taken on such a determination would presumably require a hearing with appropriate notice and opportunity for the parties to be heard before disposition of the case on one of these bases." *Report of the Caseflow Management Rules Committee*, 435 Mich at 1218.

Only one other court appears to have squarely considered the precise issue of whether a statement in a case management order could constitute waiver of a right to

arbitration. That court rejected any notion that the purpose of a case management order is to elicit waivers of substantive rights. In the case of *In re Charter Behavioral Health Sys, LLC*, 277 BR 54, 58 (Bankr D Del 2002), the federal bankruptcy court considered whether the defendant had waived its right to arbitration by agreeing to a scheduling order that provided, among other things, that "'the parties hav[e] determined after discussion that the matter cannot be resolved at this juncture by settlement, voluntary mediation or binding arbitration.'" The bankruptcy court held this provision of the case management order did not operate as a waiver of arbitration because the purpose of the scheduling order was to set out parameters to efficiently and effectively manage the case, and it would not be appropriate to find waiver based on such an order. *Id.* In other words, the scheduling order was not meant to force the parties to commit to substantive positions or to compel them to forfeit rights they would otherwise have.

b. The CMO was not a stipulation

The Court of Appeals held that the Business Court's placement of a check in the "is not applicable" box in the CMO was a "stipulation" by Mando that waived arbitration. The CMO expressly states, however, that the parties made no admissions or stipulations of fact during the teleconference. *See* CMO at 2.[6]

[6] Insofar as the Appellate Decision could be read to suggest that Mando stipulated to the legal issue of whether Nexteer's claims were arbitrable under Section 11 of the NDA, that would be wrong for multiple reasons. *First,* as discussed above, the circumstances and surrounding language make clear that the Business Court's checking the box "not applicable" and not checking "waived," could not have been a stipulation of waiver by Mando. Further, parties cannot stipulate to issues of law, such as whether Nexteer's Complaint was arbitrable or not. *See Matter of Estate of Finlay*, 430 Mich 590, 595; 424 NW2d 272 (1988) (finding that court could not be bound by party stipulation "that the Probate Code applie[s]," when action began after the effective date of the Revised Probate Code).

Moreover, the Court of Appeals' focus on the CMO's "isolated" statement that the arbitration agreement "is not applicable" ignored the surrounding circumstances and the whole record. *See Whitley v Chrysler Corp*, 373 Mich 469, 474; 130 NW2d 26 (1964) (a stipulation "is to be read and construed in the light of the surrounding circumstances and the whole record. A stipulation must be construed as a whole and the intention of the parties collected from the entire instrument, and not just from detached or isolated portions"). Viewed in context, the statement that the NDA's arbitration agreement "is not applicable" cannot be read as a stipulation to waive. The entire statement in the CMO regarding the arbitration agreement reads, "[a]n agreement to arbitrate this controversy exists" but "is not applicable." CMO at 2 (**Exhibit O**). The NDA specifically provided that a party "may seek a preliminary injunction . . . from a court with competent jurisdiction." NDA § 11(b) (**Exhibit N**). As of November 25, 2013 when the Business Court signed the CMO, Nexteer had represented that it would pursue its claims through an expedited motion for a preliminary injunction. *See* TRO Hearing at 25:2-7; 27:13-25 (**Exhibit Q**). Accordingly, a proper interpretation of the statement in the CMO is that there was an arbitration agreement, but, given the procedural posture of the case – Nexteer's pending application for a preliminary injunction – the clause was not applicable at that time. The CMO was not a stipulation to waive arbitration.

c. The CMO did not trump the rule that leave to amend an answer shall be "freely given"

The Court of Appeals' decision also runs counter to Michigan's rules regarding the amendment of pleadings. The CMO was discussed and entered before Mando had to answer the Complaint. *See* CMO at 1 (**Exhibit O**). Indeed, the CMO specifically notes that Mando's affirmative defenses were "not yet due." *Id.* MCR 2.118(A)(2) provides that leave to amend a pleading "shall be freely given when justice so requires." *Id.* The rule is "'designed to facilitate the amendment of pleadings except where prejudice to the opposing party would result.'" *Ben P Fyke & Sons, Inc v Gunter Co*, 390 Mich 649, 656; 213 NW2d 134 (1973) (quoting *United States v Hougham*, 364 US 310, 316; 81 S Ct 13; 5 L Ed 2d 8 (1960)). Indeed, this Court has held that a defendant could amend its answer to assert certain affirmative defenses as late as *during a trial*. *See Sands Appliance Servs, Inc v Wilson*, 463 Mich 231, 239-40; 615 NW2d 241 (2000).

Similarly, Michigan's Uniform Commercial Code permits retraction of a waiver "unless the retraction would be unjust in view of a material change of position in reliance on the waiver by that party." MCLA 440.2209; s*ee also* 13 Williston on Contracts § 39:20 (4th ed.) ("Under general principles of contract law, a party who has waived an executory provision of a contract may retract the waiver by notifying the other party that strict compliance with the term waived will be required unless the retraction would be unjust in light of a material change of position undertaken in reliance on the waiver"). Though Mando denies that any waiver occurred, the same considerations that favor allowing parties to change position in other procedural settings support the

Business Court's decision that arbitration should be permitted in the absence of prejudice to Nexteer.

As the presiding Business Court judge recognized, this case "ha[d] not wholly emerged from the pleading stage" when Mando moved to amend its Answer. *See* Arbitration Order at 12 (**Exhibit B**). There was no finding of prejudice to Nexteer. Thus, the Business Court correctly granted Mando's motion to amend its answer under Rule 2.118.

The Court of Appeals, however, found Mando to be locked into the "preliminary" CMO, regardless of any ability to amend under Rule 2.401 and Rule 2.118. This decision yields the confounding result that fully thought-out, formal pleadings may be "freely" amended in the absence of prejudice, but a party is forever bound by preliminary views regarding arbitration as of the initial case conference, even if no injustice would result from arbitration.

B. A contractual agreement to arbitrate should be enforced absent strong evidence of waiver, which is lacking here

At Nexteer's request, Mando agreed to a contract containing a broad arbitration clause. The purpose of such clauses is to promote consistency and reliability in business contracts such as the one at issue, as well as to allow the parties to agree on a favored forum for resolution of disputes. Yet the Court of Appeals did not even acknowledge this State's long standing preference for arbitration in finding that this right had been waived at the inception of the case. Instead of following the settled tenets that waiver of arbitration is disfavored and that the proponent of waiver must overcome a "high

burden of proof," the Court of Appeals created uncertainty about whether arbitration stands on a lesser footing than other affirmative defenses.

1. Doubts about waiver are to be resolved in favor of arbitration

Michigan strongly favors arbitration. *See Omega Const Co v Altman*, 147 Mich App 649, 655; 382 NW2d 839 (1985) ("Michigan's public policy favors arbitration in the resolution of disputes"); *Rembert v Ryan's Fam Steak Houses, Inc*, 235 Mich App 118, 127-28; 596 NW2d 208 (1999) (reversed in part on other grounds) (stating that "[o]ur Legislature has expressed a strong public policy favoring private voluntary arbitration, and our courts have historically enforced agreements to arbitrate disputes," and tracing such regard for arbitration back to the nineteenth century).

Courts of this State follow the rule that "waiver of a contractual right to arbitration is not favored." *See Madison*, 247 Mich App at 588. Accordingly, under Michigan law, the party asserting waiver "bears a heavy burden of proof." *Id.* at n.1. With respect to contracts involving interstate commerce, such as the one in this case, Michigan follows the federal rule that "any doubts" concerning waiver "should be resolved in favor of arbitration."[7] *Kauffman v The Chicago Corp*, 187 Mich App 284, 290; 466 NW2d 726 (1991). Therefore, any issue of waiver should be analyzed under the FAA's "liberal federal policy favoring arbitration agreements." *AT&T Mobility v*

[7] The Business Court assumed that, "[g]iven the global profile of both Nexteer and Mando . . . the NDA constitutes a transaction in or affecting interstate commerce," and, therefore, the NDA was subject to the FAA. *See* Arbitration Opinion at 6 (**Exhibit B**) ("The FAA governs actions in both federal and state courts arising out of contracts involving interstate commerce"). Nexteer also argued that the NDA was subject to the FAA. *See* Plaintiff Nexteer's Response to Mando America's Motion to Amend Answer and Compel Arbitration at 4-5 (**Exhibit K**). The Business Court noted that for purposes of this case there is "no material" difference between state and federal arbitration law. *See* Arbitration Opinion at 6 (**Exhibit B**).

Concepcion, 563 US 333; 131 S Ct 1740, 1749; 179 L Ed 2d 742 (2011) (quoting *Moses H Cone Mem'l Hosp v Mercury Constr Corp*, 460 US 1, 24-25; 103 S Ct 927; 74 L Ed 2d 765 (1983)); *Marmet Health Care Ctr, Inc v Brown*, 132 S Ct 1201, 1203; 182 L Ed 2d 42 (2012) (the FAA "reflects an emphatic federal policy in favor of arbitral dispute resolution") (quoting *KPMG LLP v Cocchi*, 132 S Ct 23, 25; 118 L Ed 2d 323 (2011) (*per curiam*)).

Far from according deference to arbitration, however, the Court of Appeals' decision interpreted the CMO in a manner that was hostile to arbitration. For example, the Court of Appeals interpreted the words "not applicable" next to the corresponding check box to mean "waived" even though the Business Court, which added that box to the CMO form, recognized that "not applicable is different" from waiver, and did not check the waiver box.

2. Courts allow parties to enforce their contractual right to arbitration at stages of litigation that are far more advanced than this case

In keeping with the strong policy in favor of arbitration, Michigan courts have declined to find a waiver from a party's failure to invoke arbitration at stages of litigation far more advanced than in this case. *See, e.g.*, *Brucker v McKinlay Transp, Inc*, 454 Mich 8; 557 NW2d 536, 537 (1997) (affirming arbitration outcome in case where prior claim of waiver had been rejected by appellate court following "years of litigation" over selection of arbitrator); *SCA Servs, Inc v Gen Mill Supply Co*, 129 Mich App 224, 231; 341 NW2d 480 (1983) (serving defensive discovery requests does not waive the right to arbitrate); *Boynton v Medallion Homes Ltd P'ship*, Unpublished opinion per curiam of the Court of Appeals, issued Apr 24, 2003 (Docket No 235939), at *2

(**Exhibit W**) (defendant did not waive its right to arbitration where defendant asserted arbitration as an affirmative defense in an amended answer, but not in its initial answer). Federal courts, too, require far more than mere participation in a case management conference to find waiver. *See, e.g., Drexel Burnham Lambert, Inc v Mancino*, 951 F2d 348, at *3 (CA 6 1991) (**Exhibit X**) (six-month interval between the filing of the original proceeding and the filing requesting arbitration does not constitute the type of actual prejudice necessary to support the waiver of the right to arbitration); *Hofmeister Family Tr v FGH Indus, LLC*, No 06-CV-13984-DT, issued Oct 12, 2007 (ED Mich) (**Exhibit Y**) (where defendants filed four motions for dismissal before filing motion to compel arbitration, the court construed such motions as an attempt to minimize disputes at an early stage of the proceeding and held that defendants did not waive their right to arbitration); *Creative Solutions Grp, Inc v Pentzer Corp*, 252 F3d 28, 32-34 (CA 1 2001) (no waiver where party filed a motion to dismiss prior to moving to compel arbitration); *Williams v Cigna Fin Advisors, Inc*, 56 F3d 656, 661-62 (CA 5 1995) (same); *Rush v Oppenheimer & Co*, 779 F2d 885, 888-89 (CA 2 1985) (no waiver of arbitration where party moved to dismiss and answered the complaint without asserting arbitration as an affirmative defense).

Notably, in the cases above finding that no waiver had occurred, it is a near certainty that the presiding court would have held a case management conference to discuss, among other things, how the parties intended to proceed with the case. Yet none of the decisions even mentions a case management order, much less establishes the case management conference as the Rubicon for waiver.

3. Michigan courts require a showing of prejudice to find waiver

Consistent with this State's strong policy favoring arbitration, it is well settled that a party asserting waiver as a defense to a right to arbitrate "must demonstrate knowledge of an existing right to compel arbitration, acts inconsistent with the arbitration right, and *prejudice* to the party opposing arbitration resulting from the inconsistent acts." *See Madison*, 247 Mich App at 588 (emphasis added); *see also Burns v Olde Dis Corp*, 212 Mich App 576, 582; 538 NW2d 686 (1995) (same); *Kauffman*, 187 Mich App at 292 (same) (not drawing any distinction between express and implied waiver when discussing the required elements).[8]

Though this Court has never spoken to the issue of whether a waiver of arbitration requires prejudice, the Court of Appeals has consistently said that prejudice is required. For example, in *Burns,* the court held,

> [W]aiver of a contractual right to arbitration is not favored. A party arguing there has been a waiver of this right bears a heavy burden of proof. The party must demonstrate knowledge of an existing right to compel arbitration, acts inconsistent with the right to arbitrate, and prejudice resulting from the inconsistent acts.

212 Mich App at 582 (internal citations omitted) (not drawing any distinction between express and implied waiver). Indeed, the requirement of prejudice has been found to preclude waiver even where the party alleged to have waived was the *plaintiff*, which affirmatively chose litigation over arbitration, and later changed its mind. *See Coon v Gilbert*, Unpublished opinion per curiam of the Court of Appeals, issued Feb 23, 2010

[8] None of these cases distinguish between an express and an implied waiver, nor is there any Michigan precedent holding that an express waiver of an arbitration right does not require prejudice.

(Docket No 290164), at *1) (**Exhibit Z**) (no waiver even though plaintiffs admittedly had knowledge of right to arbitrate and "changed their position" after learning that litigation would likely be less costly, where extent of litigation conduct was filing complaint and opposing motion to dismiss, and there was no prejudice to opposing party).

Moreover, Michigan's Uniform Commercial Code permits retraction of a waiver "unless the retraction would be unjust in view of a material change of position in reliance on the waiver by that party." MCLA 440.2209; *see also* 13 Williston on Contracts § 39:20 (4th ed.) ("Under general principles of contract law, a party who has waived an executory provision of a contract may retract the waiver by notifying the other party that strict compliance with the term waived will be required unless the retraction would be unjust in light of a material change of position undertaken in reliance on the waiver"). This provides further support for the idea that prejudice is highly relevant to the concept of waiver, and particularly to the finality of any alleged waiver.

The Court of Appeals' decision eliminated the requirement that prejudice is needed to find that a waiver has occurred, with no basis in judicial precedent to justify its departure. The Court of Appeals' decision implicitly acknowledges the lack of authority on point by citing to a case that has nothing to do with arbitration, *Quality Products and Concepts Co v Nagel Precision, Inc*, 469 Mich 362; 666 NW2d 251 (2003). *See Nexteer Automotive Corp v Mando America Corp, et al*, opinion of the Court of Appeals, issued February 11, 2016 (Docket No. 324463), slip op at 4. (**Exhibit A**). Though answering the question of whether "mere silence" could be waiver in the negative,

Quality Products discusses prejudice only in dictum. *See Quality Products*, 469 Mich at 377-78. In no way does *Quality Products* stand for a rule that the important right of arbitration can be waived by a preliminary CMO. Nor does *Quality Products* support elimination of the prejudice requirement from analysis of whether a contractual right to arbitrate has been waived.

4. Federal courts also factor prejudice into waiver analysis

This Court has recognized the important role that prejudice plays in federal waiver analysis. *See Ouellette Carpentry Co v Mazda Motor Mfg (USA) Corp*, 437 Mich 852, 852-57; 461 NW2d 717 (1990) (remanding issue of waiver in case applying federal standards, with specific instruction to make findings regarding existence of prejudice); *accord Gen Star Nat Ins Co v Administratia Asigurarilor de Stat*, 289 F3d 434, 438 (CA 6 2002) ("[a]n agreement to arbitrate may be waived by the actions of a party which are completely inconsistent with any reliance thereon . . . a party may waive the right by delaying its assertion to such an extent that the opposing party incurs actual prejudice"); *Creative Solutions Grp, Inc*, 252 F3d at 32 (to prevail on a claim that a party waived its arbitration right, the party asserting waiver must show prejudice); *Oppenheimer & Co*, 779 F2d at 887; *Ehleiter v Grapetree Shores, Inc*, 482 F3d 207, 223 (CA 3 2007); *Patten Grading & Paving, Inc v Skanska USA Bldg, Inc*, 380 F3d 200, 206 (CA 4 2004); *Cargill Ferrous Int'l v Sea Phoenix MV*, 325 F3d 695, 700 (CA 5 2003); *Stifel, Nicolaus & Co, Inc v Freeman*, 924 F2d 157, 158 (CA 8 1991); *Britton v Co-op Banking Grp*, 916 F2d 1405,

1412 (CA 9 1990); *Ivax Corp v B Braun of Am, Inc*, 286 F3d 1309, 1315-16 (CA 11 2002).[9] The Court of Appeals' disregard for the fact that there was no finding of prejudice against Nexteer not only ignored the precedent of this State, but conflicted with the strong federal preference for arbitration, by finding waiver even without a showing of prejudice to Nexteer.

[9] Even the three minority federal Circuit Courts that do not require prejudice as a specific element of waiver acknowledge that prejudice remains an important part of the waiver analysis. *See Hill v Ricoh Americas Corp*, 603 F3d 766, 774-76 (CA 10 2010) ("the final consideration in waiver analysis is prejudice to the party opposing arbitration"); *Khan v Parsons Glob Servs, Ltd*, 521 F3d 421, 425 (DC Cir 2008) ("a court may consider prejudice to the objecting party as a relevant factor"); *Cabinetree of Wisconsin, Inc v Kraftmaid Cabinetry, Inc*, 50 F3d 388, 390-91 (CA 7 1995) ("prejudice to the other party, the party resisting arbitration, should weigh heavily in the decision whether to send the case to arbitration").

CONCLUSION

For the reasons set forth above, Defendants-Appellants respectfully request that the Court take peremptory action reinstating the Business Court's judgment or grant leave and reverse the Court of Appeals decision of February 11, 2016.

Respectfully submitted,

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Dated: March 23, 2016

STATE OF MICHIGAN

IN THE SUPREME COURT

(ON APPEAL FROM THE MICHIGAN COURT OF APPEALS)

NEXTEER AUTOMOTIVE CORPORATION, a Delaware corporation,

Plaintiff-Appellee,

v

MANDO AMERICA CORPORATION, a Michigan corporation, TONY DODAK, an Individual; ABRAHAM GEBREGERGIS, an Individual; RAMAKRISHNAN RAJAVENKITASUBRAMONY, an Individual; CHRISTIAN ROSS, an Individual; KEVIN ROSS, an Individual; TOMY SEBASTIAN, an Individual; THEODORE G. SEEGER, an individual; TROY STRIETER, an Individual; JEREMY J. WARMBIER, an Individual; and SCOTT WENDLING, an Individual; jointly and severally,

Defendants-Appellants,

and

CHRISTIAN ROSS, KEVIN ROSS, TOMY SEBASTIAN, THEODORE G. SEGER, and TONY DODAK,

Counter/Third-Party Plaintiffs,

v.

NEXTEER AUTOMOTIVE CORPORATION, a Delaware corporation, LAURENT BRESSON, and FRANK LUBISCHER,

Counter/Third-Party Defendants. /

Supreme Court No.

Court of Appeals No. 324463

Lower Court No. 13-021401-CK
(Saginaw County Circuit Court)

PROOF OF SERVICE

Marjorie E. Renaud, being duly sworn, deposes and says that she is an employee of the law firm of Plunkett Cooney, and that on March 23, 2016, she caused to be served a copy of Notice of Filing Application, Application for Leave to Appeal, and Proof of Service as follows:

John R. Trentacosta (P31856) John F. Birmingham (P47150) 500 Woodward Avenue Suite 2700 Detroit, MI 48226 (313) 234-7100 *Attorneys for Plaintiff-Appellees Nexteer Automotive and Counter/Third-Party Defendants Laurent Bresson and Frank Lubischer*	**Counsel was e-served via TrueFiling**

The undersigned further states that the *Notice of Filing Application and Proof of Service* was served upon the following courts:

Clerk of the Court Saginaw County Circuit Court 111 S. Michigan Ave. Saginaw, MI 48602	**The trial court was served via U.S. mail, all postage prepaid**
Michigan Court of Appeals P.O. Box 30022 Lansing, MI 48909	**The Court was served via the Court of Appeals' TrueFiling System**

/s/Marjorie E. Renaud

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